

Chapter 8

Taking stock

8.1 Under its terms of reference, the committee is required to assess the adequacy and appropriateness of key aspects of the 2010 tender process. The terms of reference focus on the probity of the procurement and cover four broad areas:

- (a) ***governance arrangements***—the adequacy of, and adherence to, processes for the identification and management of conflicts of interest throughout the tender process.¹
- (b) ***tender design***—whether the technical requirements or tender conditions in the request documentation were designed to unfairly advantage a particular respondent.²
- (c) ***matters of due diligence***—whether the tender respondents (and their key personnel and associated companies) were fit and proper persons to contract with the Commonwealth, and possessed the financial and commercial capacity to deliver the contracted services to the requisite quality and standard.³
- (d) ***other relevant matters***—any further issues concerning the probity of the procurement and the tender respondents, including the appointment of a permanent and independent probity advisor to oversee the awarding of all Commonwealth aviation contracts.⁴

8.2 The committee has identified several matters of concern within these broad areas. In this chapter, the committee provides a summary of the findings of, or observations made by, Clayton Utz, AFCD, PwC, Deloitte and AGS. In the subsequent chapters, the committee considers in greater depth the governance arrangements, tender design and due diligence and other relevant probity matters. Before outlining its findings and recommendations, the committee explains its approach to assessing the adequacy and appropriateness of the 2010 tender process.

The committee's approach to assessing adequacy and appropriateness

Achieving the objectives of good probity management

8.3 In approaching its terms of reference, the committee is not confined to strict matters of technical compliance, such as the identification of grounds upon which the procurement should have been discontinued. Rather, the committee is concerned with

1 Terms of Reference, paragraphs (a)(iii),(iv),(vi),(vii).

2 Terms of Reference, paragraphs (a)(ii), (v).

3 Terms of Reference, paragraphs (a)(i),(viii); (b)(i)-(iv).

4 Terms of Reference, paragraph (b)(v).

achieving the objectives of good probity management, as contained in Commonwealth procurement policy.

8.4 These objectives include the maintenance of public sector integrity; the achievement of effective procurement outcomes; maximising efficiency by reducing the likelihood of resource-intensive conflicts or complaints associated with the procurement; and maintaining relationships of mutual trust and respect with suppliers.⁵

8.5 The committee observes that the 2010 tender has been the subject of no less than five separate reviews.⁶ It has also come under considerable parliamentary scrutiny through the Senate estimates process,⁷ and was subject to significant public criticism.⁸ Information that emerged during the reviews of the tender has led to criminal investigations into the awarding of a previous contract in 2005.⁹

8.6 Clearly, the associated costs to Defence—both financial and reputational—have been substantial. It is highly unsatisfactory that a Commonwealth procurement exercise should attract such controversy and exposure to public embarrassment. The following advice in FMG 14 on ethics and probity in Commonwealth procurement is apposite:

Perceptions should not be overlooked when considering probity. It is important not only to do the right thing, but also to be seen to be doing the right thing. The public should be confident that officials conducting procurement will maintain a professional relationship that stands up to public scrutiny.¹⁰

5 Department of Finance and Deregulation, *Ethics and Probity in Procurement*, Financial Management Guidance 14.

6 These are: the AFCD Review, the PwC Review, the Deloitte Review, the AGS Review and the committee's inquiry.

7 See, for example, *Committee Hansard*, Estimates, 23 February 2011, pp. 89–91; *Committee Hansard*, Estimates, 19 October 2010, pp. 8–10, 49–71; Department of Defence, *Response to Questions on Notice, Supplementary Budget Estimates 2010-2011*.

8 See, for example, the series of articles by journalist Richard Baker, including: 'Concerns over Defence contract', *Age*, 12 August 2010, p. 5; 'Defence bidders got inside help', *Age*, 2 September 2010, p. 1; 'The sky's the limit', *Age*, 2 September 2010, p. 13; 'Pledge to probe Defence contract', *Age*, 3 September 2010, p. 6; 'Pledge to probe Defence contract', *Age*, 3 September 2010, p. 6; 'Probes on deal to fly troops', *Age*, 13 September 2010, p. 1; 'Police to probe \$30m Defence deal', *Age*, 14 September 2010, p. 5; 'Defence contract row widens', *Age*, 30 September 2010, p. 13; 'Defence must act on contract cover-up claims', *Age*, 18 November 2010, p. 18.

9 Department of Finance and Deregulation, *Guidance on Ethics and Probity in Government Procurement*, Financial Management Guidance 14 (January 2005) ('FMG 14'), p. 16.

10 FMG 14, p. 16.

The scope of the committee's findings and recommendations

8.7 After careful consideration, the committee has determined not to make findings or recommendations on two matters. First, the committee does not express any views on the substance of allegations of fraudulent conduct in the 2010 tender process or any previous tender processes. In particular, the committee does not make any definitive findings as to whether there were any unauthorised disclosures of confidential tender information. Secondly, in the absence of conclusive evidence on these allegations of fraud, the committee does not make any retrospective findings or recommendations as to whether the 2010 tender process should have been discontinued on probity grounds.

8.8 In the committee's view, such findings would require specialised forensic examination. Regrettably, such examination was not conducted as part of the reviews commissioned by Defence. The committee is also conscious that at the time of writing, the 2005 tender process was under investigation by the AFP. In addition, the committee acknowledges that retrospective findings on whether the tender process should have been discontinued would have limited effect on the procurement outcome, given that the contract has been awarded and has commenced.

8.9 In declining to make findings on these matters, the committee emphasises that it does not discount the possibility that fraudulent or other acts of wrongdoing may have been committed. Accordingly, the committee's findings should not be interpreted as an endorsement of Defence's decision to proceed to contract. Rather, the committee's approach reflects the fact that there is insufficient evidence available to reach a definitive conclusion.

Areas for improvements

8.10 There is no doubt, however, that there were shortcomings in the 2010 tender. Indeed, it courted trouble from its very inception. Dr Watt accepted the fact that the process had problems. He stated:

Did we make a mistake at the start in not putting more arrangements in place, given the history of the industry? I think we would all acknowledge with hindsight that we would have done that.¹¹

8.11 Despite recognised deficiencies in the tender process, Defence relied heavily on the findings of numerous reviews to justify proceeding to contract with the preferred tenderer, Adagold. Although the reviews found flaws in the tender process, they concluded that the failings were not sufficiently material to render the decision to award the contract to Adagold unsound.

8.12 When considered together, however, the reviews identified a raft of deficiencies not only in the planning phase but also in the evaluation stages. They

11 *Proof Committee Hansard*, 28 June 2011, p. 17.

highlighted inadequacies in the probity management throughout the tender process, citing areas where it could have been strengthened, especially in developing a probity framework and formulating probity plans and protocols, documenting probity risks and plans, and appointing a probity adviser. Both Deloitte and AGs referred to lapses in the management of conflicts of interest.

8.13 The reviews, especially by the AGS, revealed inadequacies in the design of tender documents and the implementation of the tender processes. They drew attention to the need for stronger risk management arrangements; improved documentation; clearer definitions in the request documentation; more detail on the scoring and pricing model and a fuller account of the evaluation methodology in the TEP (for example, the scoring methodology adopted by the TEB and TEWG was not referenced in the TEP and the TEP did not provide clear guidance as to how each criterion was to be assessed). The AGS noted that the TEWG reports and SER could have 'more accurately and transparently reflected the assessment of tender responses' and the SER could have provided a clearer explanation of rankings in the SER. The process could also have benefited from earlier and better consultation between those developing the TEP and also between elements of the tender team in the evaluation process.

8.14 Three matters of particular concern were Clayton Utz's observation on unequal treatment; the discovery of a mathematical error when reviewing the Source Evaluation Report; and AFCD's preparation of the statutory declarations. The committee assesses the significance of the findings of the respective reviews in the following chapters.

The reviews and the reliance on their findings

8.15 The committee was not only concerned about the deficiencies in the tender process identified by the reviews but with aspects of the reviews themselves, particularly the limitations on their time, scope and methodologies. The veracity of their conclusions is critical because of Defence's heavy reliance on their findings to salvage the reputation of the tender process.

8.16 Even though those conducting the reviews acknowledged the limitations and produced qualified reports, their shortcomings cannot be ignored. In this regard, the committee notes:

- the time constraints placed on each review—the AFCD review in particular mentioned, on a number of occasions, the tight timeframe needed to facilitate the signing of the contract;¹²
- the limited terms of reference which meant that potentially important factors were not considered—for example, the reviews did not examine concerns raised

12 See chapter 5, paragraphs 5.18–5.19 and 5.36–5.5.41.

at the end of the 2005 tender about that process, or Major Charlton's relationship with Adagold, through AIS, at the time of the unsolicited proposal in 2010;¹³

- AFCD and AGS considered the tender process and its compliance with the Deed of Standing Offer but not whether the Deed itself was a suitable arrangement for the tender;
- AFCD's failure to interview Mr Aisen, which was not rectified by subsequent reviews;¹⁴
- the reliance by Deloitte and AGS on Defence interviews and documentation without independent verification, which meant that any original weakness or oversight carried over into their reviews;¹⁵ and
- Defence drafted the statutory declarations signed by Major Charlton and Mr Clark on which it then relied to determine facts: subsequent reviews also relied upon these declarations.¹⁶

8.17 At a minimum, the committee considers that the AFCD review should have interviewed Mr Aisen. It would not have been unduly onerous to do so. The decision not to interview him meant that the reviews did not resolve or at least attempt to defuse the probity risk posed by his ongoing and increasingly public complaints. The committee acknowledges that interviewing Mr Aisen may not necessarily have prevented him or any other proponent from making further allegations. However, this step—which was clearly feasible in the time available—could have limited the adverse impact of future grievances. It could have provided a firm basis for Defence's finding that the complaints were based on speculation or conjecture, if that was, in fact, the case.

8.18 The committee agrees with the observation of the PwC review that such a course would have furthered the interest of 'being seen to conduct a fair and transparent process'.¹⁷ The fact that the AFCD review was followed by two external reviews and a parliamentary inquiry is a salutary reminder that significant weight should be placed upon interviewing complainants in future probity reviews.

8.19 The committee is of the view that the reviews have not succeeded in removing all doubts about the procurement process particularly the pre-tender stage and the potential for conflicts through the use of insider knowledge. Moreover, by finding that the tender process merely complied with written policy guidelines and manuals, the reviews ignored the important fact that in some aspects the process was not best

13 See chapters 5 and 6.

14 See chapters 5 and 6.

15 See chapter 6.

16 See chapter 2. See further Dr Raymond Bromwich, *Proof Committee Hansard*, 29 March 2011, pp. 80–81.

17 PwC Review, p. 8. See further chapter 5.

practice. Indeed, when it came to probity matters, the process disregarded strong advice contained in official policy documents.

Conclusion

8.20 In this chapter, the committee brought together in summary form the observations of the respective reviews to provide a more complete and accurate picture of the deficiencies in the governance arrangements for the tender process. In the following chapters, the committee uses the findings of the reviews and other evidence before it to draw conclusions about the tender process. It looks first at the management of risk and associated probity issues, then the design and conduct of the tender and finally due diligence.